

## **RIGHTS-OF-WAY USE AGREEMENT**

This Rights-of-Way Use Agreement (the "Agreement") is executed as of the \_\_\_\_ day of August 2008, between Fiber Technologies Networks, L.L.C. ("Fibertech"), a New York State limited liability company, and THE MAYOR AND COUNCIL OF ROCKVILLE, MARYLAND, (the "City"), a municipal corporation.

### **WITNESSETH**

WHEREAS, Fibertech will offer telecommunications services to customers located in Rockville, Maryland; and

WHEREAS, Fibertech desires to place communications facilities underground within conduits, ducts, mains and/or pipes and overhead on poles, which communications facilities are or will be located under and on rights-of-way controlled by the City; and

WHEREAS, the City is willing to permit, under certain conditions set forth herein, the construction of a communications system and placement of communications facilities on the rights-of-way controlled by the City.

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained, the parties do hereby mutually covenant and agree as follows:

1. Before constructing or placing communications facilities on or in the rights-of-way controlled by the City, Fibertech shall make application and receive a permit therefor as required by the Department of Public Works. Prior to making application pursuant to this paragraph, Fibertech will: A) in the case of construction of new conduits or erection of new poles, provide notice to other utility companies having a right-of-way in the same location in which Fibertech wishes to place its telecommunication facilities, or B) in the case of locating new cable in existing conduits or on existing pole space, obtain a conduit occupancy agreement or a pole attachment agreement from the owner of the conduit or poles. Fibertech shall construct its facilities so that they do not interfere with the existing facilities of other utility companies. Any cott markers used by Fibertech shall be flush-type cott markers and shall be approved by the City's Department of Public Works.
2. The City will use its best efforts to approve or deny any applications within thirty (30) business days after receipt.
3. Fibertech will be responsible for all site survey and other engineering costs. Fibertech will pay the then current City permit fee at the time of filing the application for any required permit. Fibertech shall also comply with all applicable City ordinances with respect to the posting of the surety bond described in Article 14 hereof.

4. Upon application for a permit for installation of underground conduit, Fibertech will provide the City with specifications regarding conduit materials, which specifications shall meet the City's reasonable requirements as to such materials. Fibertech will notify the City at least 48 hours in advance whenever work is proposed which will interfere with or cause damage to any portion of the public right-of-way.
5. Fibertech will join "Miss Utility;" will comply with the "Miss Utility" notice requirements, and will provide to the City evidence of having joined "Miss Utility" before the City will issue any permit.
6. Fibertech will comply with applicable federal, state, county and City laws, including but not limited to any ordinance imposing franchise fees, rental fees, etc.
7. Fibertech will maintain all facilities constructed or installed pursuant to the permits issued under this Agreement in safe condition and in good repair.
8. Prior to commencement of construction, Fibertech shall post or shall cause to be posted notices of such construction along the City right-of-way where the construction will take place. The notices shall include a local or toll-free telephone number for residents to call with questions or complaints regarding the construction work. Fibertech will maintain a log of any complaints received and will provide the City with a copy of such log upon request. During construction Fibertech will take all necessary precautions to protect persons and property against injury. After construction, Fibertech will restore the rights-of-way to substantially the same condition as existed prior to construction. Upon completion of construction, Fibertech shall provide to the City two (2) complete sets of copies of all "as-built" plans for the telecommunications facilities in paper and one set in an electronic format compatible with the City's GIS system.
9. It is expressly understood by Fibertech that this Agreement and any permits issued hereunder do not create or vest in Fibertech any easement or other ownership of real property rights on the rights-of-way. This Agreement and the permits are in the nature of a non-exclusive license which is revocable by the City to the extent such revocation is necessary to protect the public health, safety and welfare. Except as otherwise provided in Articles 10 and 16 hereof, prior to any such revocation, the City will provide Fibertech with as much written notice as possible, but in no event less than ninety (90) days.
10. If Fibertech shall be in breach of any provision of this Agreement or a permit issued hereunder, the City will provide Fibertech with a written notice of default specifying the alleged breach. Fibertech shall have thirty (30) days from receipt of notice to cure such breach, provided that if the breach, by its nature cannot be cured within said thirty (30) days, Fibertech shall not be in default if it commences curing within said thirty (30) days and thereafter continuously and

diligently pursues the cure to completion. If Fibertech fails to so cure the breach, the City may declare Fibertech in default and revoke the relevant permit or permits upon ten (10) days advance written notice to Fibertech. The City may issue stop work orders and/or revoke permits or take other enforcement action under the City Code.

11. Fibertech shall indemnify and hold harmless the City from and against any and all losses, claims, suits or demands for damages to property or persons arising out of Fibertech's use of the rights-of-way, unless such loss, claim, suit or demand for damages is caused by the gross negligence or willful misconduct of the City, its employees, agents or contractors.
12. Fibertech, at its expense, will carry commercial general liability insurance that will name the City as an additional insured and will protect the parties against losses, claims, suits, or demands for damages to property or persons arising out of Fibertech's use of the rights-of-way, with a combined single coverage limit of not less than Two Million Dollars (\$2,000,000.00).
13. Fibertech shall not assign or transfer this Agreement without the written consent of the City, such consent not to be unreasonably withheld or delayed. Notwithstanding the foregoing, Fibertech may assign this Agreement without the consent of the City to an entity that controls, is controlled by, or is under common control with, Fibertech. Furthermore, nothing in this provision shall be construed as prohibiting Fibertech from entering into secured financing arrangements involving the communications systems or facilities.
14. In installing its facilities Fibertech shall satisfy all of the applicable provisions of Chapter 21 of the Rockville City Code, entitled "Streets and Public Improvements" (the "Road Code"). Prior to the issuance of any permit by the City Fibertech shall furnish a performance bond in form satisfactory to the City, and in an amount to be determined in accordance with the Road Code provisions governing such bonds, as security for the commitment of Fibertech to satisfy the Road Code and to otherwise perform the installation in compliance with this Agreement. Such bond shall be released upon the expiration of five (5) years (ten (10) years for boring) after completion of construction, final inspection and acceptance of same by the City. Further, although a bond must be maintained in effect until five years after completion of construction, final inspection and acceptance of the same by the City, the City will accept a bond with a term of one year, provided the same is renewed annually and that the City receives notice at least ninety (90) days prior to the expiration of any one year term of the bond if the bonding company will not be renewing such bond for an additional one year term. If the bond is not renewed, Fibertech shall obtain a replacement bond in the same amount for an additional one year term. If the bond is not renewed and a replacement bond is not provided, Fibertech's rights to use the public right-of-way pursuant to this Agreement shall terminate.

15. Failure of either party to enforce or insist upon compliance with any provision of this Agreement shall not constitute a waiver of such provision by such party.
16. Should a conflict arise between a Fibertech facility and an existing or proposed City facility, then Fibertech shall at its sole expense, relocate or eliminate said conflicting Fibertech facility upon written notice from the City to do so and said relocation or elimination shall be completed as soon as practicable after receipt of said notice, but under no circumstances more than sixty (60) days thereafter, unless an extension of the sixty (60) day limit is specifically granted in writing by the City. The City shall use good faith efforts to designate locations for any relocated facilities that will permit Fibertech to continue to serve its existing customers. Notwithstanding the foregoing, Fibertech shall not be required to pay to the City any permit fees in connection with a relocation required by the City under this Article 16.
17. As additional consideration for the granting of the license to use the public right-of-way as set forth herein, Fibertech will provide to the City, for use only by the City in pursuing its governmental purposes, four strands of fiber residing in a Fibertech fiber-optic cable wherever Fibertech may install such a cable within the City, except that Fibertech shall not be required to provide to the City such four strands within service drops installed with the sole purpose of reaching the location of a specific customer other than the City. The city will not be charged for such four strands. Fibertech will deploy cable to the City Community Center in the Fallsgrove area and to City Hall, and four strands of fiber in such cables will be dedicated to the City's use. The City shall provide the building-entry facility at both the Community Center and City Hall through which the cable will be installed. Fibertech agrees to deploy cable to the City Pumping Station near Glen Mill Road if and when Fibertech has installed cable (other than a service drop) to a point located one-half mile or closer to the Pumping Station as measured along a street or streets, and the City will provide the building-entry facility into the Pumping Station for the cable. Fibertech shall have the sole right and responsibility for splicing any connection between the four Fibertech strands devoted to the City's use in accordance with this paragraph and other fiber strands owned or controlled by the City that the City wishes to connect to any of its four strands within the Fibertech cable. For purposes of this paragraph, "governmental purposes" shall include use by City-sponsored organizations that have board members or directors appointed by the Mayor and/or Council, in addition to use by the City and its various departments and agencies.
18. In the event Fibertech chooses to extend its network beyond the initial design, Fibertech shall obtain City approval for such extension. It is understood that Fibertech may be required to provide additional cable, connections or other considerations for City facilities in the vicinity of the extended network.
19. Subject to Article 13, this Agreement shall extend to and bind the successors and assigns of the parties hereto.

20. Notice required under this Agreement will be addressed as follows:

If to the City:

City Manager  
Rockville City Hall  
111 Maryland Avenue  
Rockville, Maryland 20850

With a copy to:

Television and Telecommunications Manager  
Rockville City Hall  
111 Maryland Avenue  
Rockville, Maryland 20850

If to Fibertech:

General Counsel  
Fibertech Networks, LLC  
300 Meridian Centre  
Rochester, NY 14618

Notices shall be mailed to the addressee by registered or certified mail, return receipt requested, with postage prepaid, or delivered by reputable courier service, with signed evidence of receipt, and shall be deemed delivered when received or refused by the addressee.

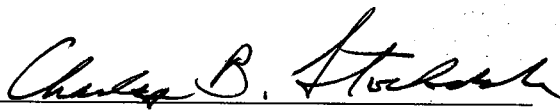
21. Fibertech shall provide to the City's Department of Public Works 24-hour, 7-day per week emergency contact information. This information shall include the emergency contact's name, title, phone number, cellular/mobile phone number, e-mail address, and mailing address. Updated information shall be provided whenever it changes.
22. This Agreement shall be governed by the laws of the State of Maryland. The parties agree that any litigation arising from this Agreement shall be brought in the Circuit Court for Montgomery County, Maryland, to the extent such court has jurisdiction, and the parties hereby waive any objection to venue in such court.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives as of the date first above written.

ATTEST:

Fiber Technologies Networks, L.L.C.  
By: Fibertech Networks, LLC, its sole member

  
James Hoare

By: 

Name: Charles B. Stockdale

Title: Vice President, General Counsel, & Secretary

ATTEST:

THE MAYOR AND COUNCIL OF ROCKVILLE

\_\_\_\_\_  
Claire F. Funkhouser, City Clerk

By: \_\_\_\_\_  
, City Manager